NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX
APPELLATE DIVISION

JOHN ALCINDOR, JR.,	)	
	)	**D.C. Crim. App. No. 2004/84**
Appellant,	)	
	)	
v.	)	Re: Super. Ct. Crim. 91/2002
	)	
GOVERNMENT OF THE V.I.,	)	
Appellee.	)	
	)	

On Appeal from the Superior Court of the Virgin Islands

Considered: August 18, 2006
Filed: November 28, 2006

BEFORE: **CURTIS V. GOMEZ**, Chief Judge, District Court of the Virgin Islands; **RAYMOND L. FINCH,** Judge of the District Court of the Virgin Islands; and **IVE A. SWAN**, Judge of the Superior Court of the Virgin Islands, Sitting by Designation.

APPEARANCES:

JOMO MEADE, ESQ.
St. Croix, U.S.V.I.
Attorney for Appellant.

MAUREEN PHELAN, AAG
St. Thomas, U.S.V.I.
Attorney for Appellee.

MEMORANDUM OPINION

PER CURIAM.

John Alcindor ("Alcindor" or "appellant") was convicted in the Superior Court of three counts of assault in the third degree, and one count each of unauthorized possession of a

firearm during the commission of a crime of violence and reckless endangerment in the first degree, in violation of V.I. Code Ann. tit. 14, §§ 297(2), 2253(a) and 625(a). The conviction stemmed from charges that Alcindor fired several shots at two adult individuals and an infant as they walked through an Estate Grove Place community. Appellant now asks this Court to review:

> 1. Whether the trial court erred in denying his Rule 29 motion for judgment of acquittal;
>
> 2. Whether the trial court erred in allowing the government to introduce hearsay testimony regarding his authority to possess a firearm in the St. Thomas-St. John district.

For the reasons which follow, the appellant's conviction will be affirmed.

I. STATEMENT OF FACTS AND PROCEDURAL POSTURE

Sometime between 3:30 and 4:00 p.m. on January 30, 2002, Trevor Augustine ("Augustine") and Elizabeth Hodge ("Hodge"), who was holding their infant son, Menelik Augustine ("Menelik"), were walking on a dirt road immediately near Building 24 of the Mutual Homes Housing community in Estate Grove Place to get to Augustine's mother's home. Augustine and Hodge testified that dirt road was regularly traveled by pedestrians, and Augustine's mother, Martha Donnelly ("Donnelly"), testified there were seven homes on the dirt road leading to her house.

While walking there, Augustine, Hodge and Menelik encountered the appellant, with whom Augustine had had an ongoing dispute. Both Augustine and Hodge testified Alcindor carried

something concealed under a blue handkerchief. Initially, as Alcindor approached, Augustine ran off to a nearby hill, although at some point he returned to his family and stood behind Hodge. During that time, Alcindor walked slowly toward Hodge and Menelik, while verbally threatening his intent to kill Augustine. As he did so, Hodge kept moving backwards, attempting to shield Augustine. As Alcindor got closer to the three, he raised a gun he was carrying and fired two shots at Augustine before fleeing the area behind a building in the housing community.

The victims testified there were people looking out of their homes and residents playing near a building in the housing community. Donnelly, who was in her home at the time of shooting, said it took her about three seconds to reach the scene, and she saw Alcindor leaving the area. All of the parties knew Alcindor prior to the incident and was able to identify him as the perpetrator.

At trial, Augustine, Hodge and Donnelly, as well as police investigators, testified for the government. Alcindor also took the stand on his behalf and denied the shootings, although he claimed he had escaped a machete attack by Augustine.

Alcindor was convicted and previously filed an appeal, which was assigned to the appellate panel convened on September 17, 2004. However, after his prior counsel sought to withdraw under *Anders v. California*, 386 U.S. 738 (1967), this Court assigned the appellant new counsel to prosecute this appeal and permitted

additional briefing. The matter is now before the Court on the merits.

II. DISCUSSION

A. Jurisdiction and Standards of Review

This Court has jurisdiction to review the judgments and orders of the Superior Court in criminal cases. *See* The Omnibus Justice Act of 2005, Act No. 6730, § 54 (amending Act No. 6687 (2004), which repealed 4 V.I.C. §§ 33-40, and reinstating appellate jurisdiction in this Court); Revised Organic Act of 1954 § 23A, 48 U.S.C. § 1613a.

The trial court's exclusion of evidence is reviewed for abuse of discretion; however, to the extent its ruling is based on an interpretation of the rules, our review is plenary. *See Gov't of the V.I. v. Petersen*, 131 F.Supp.2d 707, 710 (D.V.I. App. Div. 2001); *Gov't of V.I. v. Albert,* 241 F.3d 344, 347 (3d Cir. 2001).

We generally review *de novo* the denial of trial or post-trial challenges to the sufficiency of the evidence. The relevant inquiry is whether there was substantial evidence at trial which, when viewed along with all reasonable inferences which may be drawn therefrom in the light most favorable to the verdict-winner, would permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *See Soto v. Gov't of the V.I.*, 344 F.Supp.2d 450, 453 (D.V.I. App. Div. 2004)(citing Gov't *of V.I. v. Sampson,* 94 F.Supp.2d 639,643

(D.V.I. App. Div. 2000); *United States v. Iafelice*, 978 F.2d 92, 94 (3d Cir. 1992)). In considering sufficiency of the evidence claims, we are not to weigh evidence or second-guess the jury's credibility determinations. *Id.*(citing *United States v. Casper*, 956 F.2d 416, 421 (3d Cir. 1992)). Rather, the appellant bears a heavy burden to establish the insufficiency of the evidence, and reversal of a conviction is warranted only "when the record contains no evidence, regardless of how it is weighted, from which a jury could find guilt beyond a reasonable doubt." *Casper,* 956 F.2d at 421; *United States v. Anderson,* 108 F.3d 478, 481 (3d Cir. 1997).

Moreover, we review the trial court's admission of evidence for abuse of discretion, to the extent not based on an interpretation of evidentiary rules. *See* Soto, 344 F.Supp.2d at 453 (citing *Williams v. Government of V.I.,* 271 F.Supp.2d 696, 702 (D.V.I. App. Div.2003)).

B. Whether the Trial Court Erred In Denying Appellant's Motion for Judgment of Acquittal.

Appellant raises two challenges to the sufficiency of the evidence. First, he contends there was insufficient evidence to find that he bore the specific intent to injure Augustine, Hodge and Menelik. Secondly, he claims the evidence at trial did not support a finding that he acted with great indifference to human life, to satisfy the reckless endangerment charge.

1. Assault Third Degree

On motion for judgment of acquittal below, Appellant challenged the sufficiency of the evidence of assault third degree only as to the infant, as charged in Count I of the information, on grounds the infant could not have been assaulted where he was asleep during the incident. [Joint Appendix ("J.A.") at 97-98, 130]. Appellant does not raise that issue on appeal but, rather, argues for the first time that the evidence was insufficient as to all three of the assault victims, because the government failed to establish the appellant had the specific intent to harm the victims, where there was no violence or battery on the victims nor proof of an intent to injure them.

Where the appellant raises particular challenges to the evidence for the first time on appeal, our review is constrained to determining whether the trial court's denial of the judgment for acquittal constituted plain error. *See United States v. Kimler*, 335 F.3d 1132, 1141 (10th Cir. 2003)(citing *United States v. Chance,* 306 F.3d 356, 369 (6th Cir. 2002); *United States v. Zidell,* 323 F.3d 412, 421 (6th Cir.2003); *United States v. Herrera,* 313 F.3d 882, 884 (5th Cir.2002) (*en banc*) (per curiam); *United States v. Belardo-Quinones,* 71 F.3d 941, 945 (1st Cir. 1995); *United States v. Dandy,* 998 F.2d 1344, 1356-57 (6th Cir. 1993); CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE*: Criminal 3d* § 469 at 321-22; *United States v. Chavez-Marquez,* 66 F.3d 259, 261 (10th Cir. 1995); *United States v. Sherod,* 960 F.2d 1075, 1077 (D.C.Cir.1992)). Such error must have been plain or obvious and

must have affected the substantial rights of the appellant. *See* FED. R. CRIM. P. 52(b); *United States v. Olano,* 507 U.S. 725, 734 (1993). Under this standard, we find no grounds for reversal.

Appellant was charged in Counts 1-3 with assault third degree, under 14 V.I.C. § 297(2). Under that provision, one is guilty of assault third degree where he "assaults another with a deadly weapon." 14 V.I.C. § 297(2). As defined in the statute, "assault" is committed where the perpetrator, under circumstances not amounting to an assault in the first or second degree – "(1) attempts to commit a battery; or (2) makes a threatening gesture showing in itself an immediate intention coupled with an ability to commit a battery." 14 V.I.C. § 291. Thus, the government was required to prove that the appellant, through the use of a deadly weapon, attempted to commit a battery on the victims or made a threatening gesture with an immediate intention and a present ability to commit a battery. Contrary to the appellant's contention, conviction for assault does not, under Virgin Islands law, require proof that a battery actually occurred.[1] Nor are the requirements of section 292, defining the distinct crime of "assault and battery," implicated where the appellant was not charged under that provision.

Given the trial evidence that the appellant fired two shots

[1] Section 292 defines a "battery" as the use of unlawful violence upon another with intent to injure.

at Augustine, who was standing immediately behind Hodge and Menelik at the time, the trial court's denial of the Rule 29 motion was not plainly erroneous. *See e.g.,* *Sampson*, 94 F. Supp. 2d at 641 (matters of intent are inferred from facts and circumstances of the defendant's conduct); *Gov't of V.I. v. Lake*, 362 F.2d 770,774 (3d Cir. 1966)(noting that intent must ordinarily be proven with circumstantial evidence, given facts of case).

2. Reckless Endangerment

Appellant challenges the sufficiency of the evidence, on grounds the government failed to establish that the nearby buildings were habitable or inhabited at the time of the shooting. He further asserts that, while the victims testified they saw people looking out of their homes after the shots were discharged, "there is no evidence, circumstantial or direct, which establish where the shots were discharged or whether they were discharged in the direction where the homes are located. In fact, the evidence was that the shots were discharged on a dirt road some distance from Mutual Homes Community." [Br. of Appellant at 17]. This argument borders on the frivolous.

The statute under which Appellant was charged provides: "A person is guilty of reckless endangerment in the first degree

when, under the circumstances evidencing a depraved indifference to human life, he recklessly engages in conduct in a public place which creates a grave risk of death to another person." 14 V.I.C. § 625(a). "[C]onsciously and knowingly engag[ing] in conduct or behavior that may pose intentional harm or physical injuries to another human being or property" constitutes "reckless endangerment." 14 V.I.C. § 625(c)(1). The statute further defines "public place" as a place "to which the general public has a *right* to resort; but a place which is in point of fact public rather than private, and visited by many persons and *usually accessible* to the public." *Id.* at (c)(2)(emphasis added). By its plain terms, the statute requires only a showing that the conduct was done in a place that is open to the public or where the public has a right to be, thereby posing a risk of death to members of the public who may be in the area. We are unpersuaded that we should extend the language of the statute to limit culpability to conduct that occurs only in public places that are proven to be occupied at the time, as the appellant urges.

It was established at trial, through the testimony of Augustine, Hodge and Donnelly, that the shooting occurred on a dirt road behind the Mutual Homes Housing community, which was frequented by pedestrians. [J.A. at 17-28]. There were seven houses in the immediate area where the shooting occurred, and there was testimony that there were people looking out from their houses in the area and children playing in the nearby housing

community at the time of the late-afternoon incident. [J.A. 27-28, 45, 66]. Moreover, the evidence at trial was that Alcindor fired two shots at Augustine, who was standing immediately behind Hodge and Menelik. [J.A. at 41-42]. This evidence was sufficient to establish reckless endangerment, as defined in the statute.

C. Whether the Trial Court Erred in Allowing the Government to Introduce Hearsay Evidence Regarding His Authority to Possess a Firearm.

Alcindor next argues the trial court improperly admitted a certificate of absence of entry of firearms registration (Exh. 7) prepared by the St. Thomas-St. John firearms record custodian, to establish his lack of authority to possess a firearm in the St. Thomas-St. John district.[2] [See J.A. at 95-96]. The author of that report did not testify at trial; rather, the certificate was admitted through the testimony of St. Croix firearms custodian Police Sergeant John Felicien. This, Alcindor argues, constituted inadmissible hearsay. Again, the appellant did not object to the evidence at trial, limiting our review to plain error. Under that standard, we must affirm.

The lack of authority to possess a firearm in the Virgin

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[2] Absence of authority to possess a firearm is an essential element of the crime under title 14, section 2253(a) of the V.I. Code. *See United States v. McKie,* 112 F.3d 626, 631 (3d Cir. 1997).

Islands may be properly established through a certificate of absence of entry in an official record under 5 V.I.C. § 932 (17)(b)(writing by official custodian of official records reciting diligent search and failure to find such record admissible to prove absence of entry in public record) and § 953 (noting certificate of absence of record must be authenticated by establishing that the record is one kept in a Virgin Islands office and attested as a correct copy of the record by an officer having legal custody). Accordingly, the trial court did not err in admitting that evidence.

III. CONCLUSION

For the foregoing reasons, we reject the appellant's challenges to the sufficiency of evidence at trial. Moreover, because a certificate of absence of entry in the official firearms record is admissible under Virgin Islands law to establish that the accused had no authority to possess a firearm under 14 V.I.C. § 2253(a), we similarly reject the appellant's challenge to such evidence as impermissible hearsay. Accordingly, we affirm.

A T T E S T:
WILFREDO F. MORALES
Clerk of the Court

By:_____

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APPELLATE DIVISION

Deputy Clerk

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JOMO MEADE, ESQ.
St. Croix, U.S.V.I.
Attorney for Appellant.

MAUREEN PHELAN, AAG
St. Thomas, U.S.V.I.
Attorney for Appellee.

ORDER OF THE COURT

PER CURIAM.

AND NOW, for the reasons more fully stated in a Memorandum Opinion entered on even date, it is hereby

ORDERED that the appellant's conviction is **AFFIRMED**.

SO ORDERED this 28th day of November, 2006.

A T T E S T:
WILFREDO F. MORALES
Clerk of the Court

By:_____
Deputy Clerk

Copies (with accompanying Memorandum) to:

Judges of the Appellate Panel
The Honorable Geoffrey W. Barnard
The Honorable George W. Cannon, Jr.
Judges of the Superior Court

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